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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

11 CV 691 (LAP)

19 CR 561 (LAP)

5 STEVEN DONZIGER,

6 Defendant.

7 -----x

8 New York, N.Y.

9 October 5, 2020

11:46 a.m.

10 Before:

11 HON. LORETTA A. PRESKA,

12 District Judge

13 APPEARANCES

14 SEWARD & KISSEL LLP

Attorneys for The United States of America

16 BY: RITA M. GLAVIN

BRIAN P. MALONEY

17 SAREEN K. ARMANI

18 FRIEDMAN RUBIN

Attorneys for Defendant

19 BY: MARTIN GARBUS

-and-

20 CIVIL LIBERTIES DEFENSE CENTER

21 BY: LAUREN REGAN

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1 THE COURT: United States against Steven Donziger.

2 Is the government ready?

3 MS. GLAVIN: Yes, your Honor.

4 Rita Glavin, Brian Maloney, and Sareen Armani, for the
5 government.

6 THE COURT: Good morning.

7 Is the defense ready?

8 MS. REGAN: Good morning, your Honor.

9 Lauren Regan and I believe Martin Garbus are on the
10 line, and it's our understanding that Mr. Donziger is present
11 in the courtroom.

12 THE COURT: Yes, ma'am. Good morning.

13 Good morning, Mr. Donziger.

14 THE DEFENDANT: Good morning, your Honor.

15 THE COURT: All right, counsel. You saw that I wanted
16 to discuss representation issues. I note that no additional
17 lawyers have filed notices of appearance for you, Mr. Donziger.
18 You also declined to waive the potential conflicts with respect
19 to Mr. Friedman and Ms. Littlepage, a potential conflict you've
20 known about since May. You've also declined to fill out a CJA
21 financial affidavit.

22 Now, as a person trained in the law, you know that
23 it's better for any criminal defendant to have experienced
24 criminal defense counsel representing him or her, counsel who's
25 familiar with the Federal Rules of Criminal Procedure, the

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1 federal sentencing guidelines, and the like. On the other
2 hand, you have the right to represent yourself if you want to,
3 particularly because you are a trained lawyer.

4 I remind you again, Mr. Donziger that, when the trial
5 was adjourned on September 4, the adjourned date was 70 days
6 out, a presumptively adequate time to prepare for trial,
7 particularly because the order to show cause filed in the civil
8 case was filed on July 31 of 2019, and in the criminal case,
9 was filed on August 5 of 2019.

10 So I'm informing you again, Mr. Donziger, that the
11 trial will not be further adjourned. You will not be permitted
12 to manipulate the proceedings by your choice or nonchoice of
13 counsel. So the November 4 trial date is a firm date.

14 The second issue I wanted to discuss today was
15 witnesses appearing by video. Ms. Regan, thank you, you filed
16 a document on September 4 discussing a variety of witnesses
17 whom you say would like to appear remotely for the trial.

18 Is there any objection to the remote appearance from
19 the prosecutors?

20 MS. GLAVIN: Your Honor, with respect to a number of
21 the witnesses in the September 4th, '20 submission by the
22 defense, particularly the five witnesses in Ecuador, I think
23 that we may have objection to that, depending on the procedures
24 by which the defense would propose to admit the remote
25 testimony. So, for example, where would they be testifying

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1 from? The idea being that if remote testimony is approved by
2 the Court, there have to be procedures that ensure the sanctity
3 and the integrity of the proceeding, such that the penalties of
4 perjury can apply. The concerns that I have with respect to
5 the witnesses from Ecuador is that I'm not sure that any
6 procedures have been proposed to ensure that the oath would
7 mean anything. So that would be the first objection.

8 I do note, with respect to one of the five witnesses
9 from Ecuador, Luis Yanza, he has never appeared in the United
10 States in connection with this litigation, and, in fact, is a
11 defaulted defendant in the civil proceeding. So we would have
12 concerns about the integrity of that testimony, particularly
13 given some of the findings of his involvement in the conduct in
14 the civil case in Ecuador that led to the injunction being
15 issued and affirmed by the Second Circuit. So we have concerns
16 with that respect.

17 In addition, absent some proffer from the defense
18 about the subject matter of the testimony -- in principle, I
19 don't object to remote testimony -- but it has to get to the
20 meat of the matter. Are they fact witnesses or are they
21 character witnesses? If they are fact witnesses, what is the
22 materiality of the testimony?

23 If the testimony is such, that we think
24 cross-examination in person may be necessary, we want the
25 ability to be heard. So where I'm getting at is, certainly,

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1 with respect to the Ecuadorian witnesses, we have objections
2 along the lines that I've stated. With respect to the other
3 witnesses, I don't necessarily object in principle, but I'd
4 like to hear more from the defense about the subject matter of
5 that testimony.

6 THE COURT: Thank you.

7 Ms. Regan?

8 MS. REGAN: Thank you, your Honor.

9 First, as to the first matter that the Court
10 addressed, I would like to put on the record that Mr. Friedman
11 and Ms. Littlepage became attorneys of record in approximately
12 May of 2020 until August 28th of 2020. When they first entered
13 their appearance, Mr. Frisch was also the attorney of record as
14 the lead trial counsel, and Mr. Friedman's role was to assist
15 him with that case.

16 Shortly after Mr. Friedman entered his formal
17 appearance, he spoke on the phone with Ms. Glavin, the
18 appointed prosecutor. During the course of that conversation,
19 she told him that there might be a Curcio issue because his
20 name appeared on some documents that might come into evidence.
21 He explained to her that he was not familiar with a Curcio
22 issue because he solely handles civil matters, most of his law
23 practice. Ms. Glavin then explained the term, gave a short
24 explanation of what she considered the potential conflict, and
25 basically Mr. Friedman finished the conversation with her, and

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1 Ms. Glavin said she was going to continue evaluating the issue
2 and might revisit it in the future.

3 At that time, Mr. Friedman did not have the impression
4 that Ms. Glavin considered this a significant issue. He
5 mentioned it to Mr. Frisch and to Mr. Donziger in their next
6 call, but gave the matter no further thought.

7 Then, after at least one other phone call where the
8 topic of a Curcio hearing was raised by Ms. Glavin, Mr. Frisch
9 asked to withdraw from the case on July 4th of 2020. None of
10 the other members of the legal team knew that he was planning
11 to do that until about a day or so before he filed that motion.
12 And, at that point, the issues were with regard to financial
13 matters and not Curcio matters, which did not come up in our
14 conversations.

15 When Mr. Frisch withdrew from the case in early June,
16 Mr. Friedman was put in the position of lead counsel and
17 immediately attempted to start taking over the responsibilities
18 that Mr. Frisch had been handling prior to that time. If,
19 prior to the time of Mr. Frisch's withdrawal, Ms. Glavin had
20 raised any serious concerns about the Curcio issue with
21 Mr. Friedman, he would have brought those to the Court's
22 attention at the time of Mr. Frisch's withdrawal. However,
23 sometime after Mr. Friedman became lead counsel, Ms. Glavin
24 said she was considering asking for a Curcio hearing.
25 Ms. Glavin never told Mr. Friedman she would, in fact, be

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1 requesting a Curcio hearing until a few days before she filed
2 her letter brief to that effect on August 11, 2020. This, of
3 course, was just four weeks before the scheduled trial date and
4 almost a year from when the prosecution, Ms. Glavin, and the
5 two other attorneys, and her firm that have assisted her in
6 preparing the case for almost a year. The first hearing on
7 this issue was held on August 24, just two weeks before the
8 scheduled trial date. At that time, my two co-counsel were
9 removed from the case because of advice to Mr. Donziger that he
10 not waive any constitutional rights as a criminal defendant.

11 At that point, I was left as the only attorney of
12 record in the case. I was originally retained and brought into
13 the case for one very specific part of the defense. I'm
14 obviously based on the West Coast. And at that time, I was one
15 of four attorneys representing Mr. Donziger.

16 I am not prepared to move forward with a trial on
17 November 4th, the day after Election Day. Prior to the Court
18 issuing the trial date of November 4th, Mr. Kuby, who was
19 Mr. Donziger's selected replacement lead counsel, a criminal
20 defense lawyer who is based in New York City, he informed the
21 Court that, due to conflicts, he was unable to represent
22 Mr. Donziger or attend the trial until December 7th. When the
23 matter was postponed for September, we assumed that the Court
24 would take into consideration Mr. Kuby's tight schedule and
25 would schedule the trial date either by conferring with the

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1 attorneys or at least scheduling it on a date that the Court
2 was informed was the only date by which new pro bono criminal
3 defense counsel, based in New York City, could accommodate
4 Mr. Donziger's case. Mr. Donziger is a human rights lawyer, he
5 is not a criminal defense lawyer, and as a federal criminal
6 defendant, no attorney would ever advise a person to represent
7 themselves in federal criminal court even if they did handle
8 criminal cases in their representation or in their practice.
9 The abuse of the Curcio matter, prosecutorial abuse, is
10 actually one of the few machinations that I've observed
11 throughout the short time that I've been involved in this case,
12 and that machination has resulted in unjustifiable deprivation
13 of rights to counsel and the right to a fair trial.

14 The abuse is Ms. Glavin's failing to timely disclose
15 to the defense and the Court that the government had an
16 actionable basis for initiating a Curcio proceeding and to
17 timely initiate such proceeding with the intention --
18 retributive, vindictive, or otherwise -- knowledge, or reason
19 to know that this would deprive Mr. Donziger of his right to
20 effective assistance of counsel as to the scheduled
21 September 9th trial.

22 The prosecutor's decision to delay, until virtually
23 the eve of trial, the disclosure and initiation of the Curcio
24 proceeding to disqualify Mr. Donziger's prepared lead trial
25 attorney, virtually on the eve of trial, had the effect of

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1 basically rendering him with ineffective assistance of counsel
2 or the choice to forfeit his right to conflict-free assistance
3 of counsel.

4 That's as to the first matter. I also would like to
5 add to that, though: Since that scheduling of the court
6 hearing in our last court hearing with the Court, as the Court
7 may be aware, the West Coast has had to deal with massive wild
8 fires. In fact, my own property burned on September 9th as a
9 result of the wild fires. Many of my communities have been
10 completely destroyed and wiped off the map.

11 THE COURT: I'm sorry to hear about your home,
12 Ms. Regan.

13 MS. REGAN: Thank you.

14 My organization is a civil rights organization based
15 in a smaller community, Eugene, Oregon, and we immediately
16 stopped all of our legal work and began helping our neighbors
17 and community members evacuate and deal with the aftermath of
18 total destruction by fire. That also interrupted my ability to
19 prepare the case for trial. In fact, even as it stands now, my
20 staff and I continue to volunteer over 20 hours a week in order
21 to try to get people to safe places and animals to safe places
22 as well. So that's been another interruption to the schedule.

23 And then, finally, the fact that the trial is
24 scheduled for November 4th, the day after a highly contested
25 election, and that for the first time, due to COVID, is

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1 unlikely to be known, an outcome is not going to be known by
2 the 4th, as the executive director of a civil rights
3 organization, I had a number of commitments to my local
4 community in terms of the elections and to civic engagement
5 around the elections. By having the trial date on
6 November 4th, I will have to fly to New York City in advance of
7 that and be completely unavailable to my own community with
8 regard to the federal elections.

9 So that date, in particular, although clearly a media
10 blackout date, which might be preferable to some part of this
11 court proceeding, is a real problem with regard to the civic
12 engagement and our federal elections.

13 Secondly, with regard to the disclosure of witnesses:
14 Your Honor, as I noted when I filed that, I did the best I
15 could to go through over 125,000 pages of discovery, over 125
16 deposition videos, a decade of litigation, in order to try to
17 come up with a witness list, of which that was not part of my
18 job when I was brought into the case. But I scrambled to try
19 to put that list together, so that Mr. Donziger's rights to
20 call witnesses would not be waived.

21 Since that time, and also because of the fires, I have
22 reached out and prepared approximately eight of those witnesses
23 for trial. I don't speak Spanish, so it's been a real issue
24 working with a lot of the witnesses that we want to bring that
25 do not speak English, but I'm doing the best I can to work with

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1 interpreters to set up schedules with people, to prepare
2 witnesses for trial, to learn the other parts of the trial, the
3 other defenses that other lawyers were working on. As I said,
4 Ms. Glavin has three lawyers working on this case for about a
5 year. I am currently the only lawyer of record working on this
6 case. Because of Mr. Garbus' health issues, he has really been
7 unable to assist from Massachusetts at this time.

8 I would ask the Court to reconsider its prior ruling,
9 to allow the trial date to be scheduled after December 7th, so
10 that Mr. Kuby can be physically present in the courtroom to
11 defend Mr. Donziger.

12 Thank you.

13 THE COURT: Ms. Glavin?

14 MS. GLAVIN: Yes, your Honor.

15 With respect to the first issue that Ms. Regan raised,
16 on the issue of the Curcio hearing, and which she characterized
17 as abuse by the government and, quote-unquote, machinations,
18 there are some facts that Ms. Regan has left out. I don't
19 attribute bad faith to her, as she was not part of the
20 conversations or the back-and-forth that I had with
21 Mr. Friedman, including email correspondence.

22 I do want to note for the record that this was raised
23 not just with Mr. Friedman, but with Mr. Frisch back in May of
24 2020. I was given no indication at that time -- I viewed this
25 as a potential conflict, at best, and I did not have any

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1 indication at that time from the defense that Mr. Donziger
2 would not waive the potential conflict that he certainly was
3 aware of back in May of 2020, and much, much earlier, given
4 Ms. Littlepage's and Mr. Friedman's involvement in the case.
5 He specifically chose them to be his attorneys to represent him
6 in May and June of 2020, knowing what their involvement was in
7 the postjudgment proceedings. No issue was raised by
8 Mr. Frisch or Mr. Friedman on the Curcio issue.

9 Secondly, with respect to the date of the Curcio
10 letter -- actually, hindsight is 20/20. I never thought that
11 there would be an issue with Mr. Donziger. The only hint I had
12 that there would be an issue that Mr. Donziger may not waive
13 was after his motions for a continuance were denied.

14 What occurred was I spoke with Mr. Friedman again and
15 said I would be doing the letter. The letter took a fair
16 amount of work on our part reviewing the case law, but I fully
17 expected Mr. Donziger would waive that potential conflict, as
18 indeed, in my experience, most defendants do in that particular
19 circumstance. So it was quite surprising to me.

20 In addition -- and at that time, when we filed it on
21 August 11th, there was the motion for a continuance pending,
22 and then, as of August 19th, when that motion was denied, then
23 there was another motion for a continuance pending. That is
24 when the hearing took place, and then Mr. Donziger wanted to
25 think about this.

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1 I would note what Mr. Frisch put in his affidavit to
2 this Court when he sought to be released as counsel in the
3 case. When he moved, in July of 2020, to withdraw in the case,
4 the Court granted that conditionally, as long as it didn't
5 impact the trial date. And when it appeared that it may,
6 because Mr. Donziger, after not getting the continuance he
7 wanted -- and let me put on the record, the continuance
8 Mr. Donziger asked for was an indefinite continuance, until
9 COVID was over, in a sense, in New York City. When it appeared
10 that was not going to happen is when Mr. Donziger didn't want
11 to waive.

12 Mr. Frisch, because the Court was calling him back
13 into the case, Mr. Frisch filed an affirmation and made clear
14 in that affirmation that he had no idea, despite Mr. Frisch
15 being on notice since May of 2020, of what was a potential
16 conflict -- not an actual conflict, but a potential conflict --
17 Mr. Frisch made clear that he had no idea that Mr. Donziger
18 would not waive despite having been aware of it.

19 So, to the extent it's characterized as some type of
20 machinations or abuse by the prosecution, if I had had any
21 idea, any idea, that that issue would have been used in the
22 manner in which it was used, to get a continuance, I wish I had
23 filed that in May of 2020. But I was lulled by the defense
24 into believing that this would be waived. That didn't happen,
25 as is Mr. Donziger's right, but I want to make clear for the

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1 record that there was no abuse or intent to hurt Mr. Donziger
2 here. And, again, Ms. Regan, with respect to her recitation,
3 she was not part of any of these discussions, so I do not
4 attribute any bad faith to the manner in which she laid out her
5 recitation of the facts.

6 With respect to the characterization of the case or
7 the complexity of the case: The case isn't complicated. The
8 reason there's a lot of discovery in the case is the vast
9 amount of it is the underlying trial record, which really isn't
10 going to be relevant to this criminal contempt case. We're
11 probably going to call eight to ten witnesses, of which two to
12 three will be lengthy witnesses, and it will be testimony about
13 the postjudgment proceedings. There are court orders, and the
14 issue at trial is whether they were complied with or not - did
15 Mr. Donziger provide a list of all the devices that he had to a
16 neutral forensic expert on the date on which he was ordered to
17 do it? He didn't. He doesn't dispute that.

18 Number two, did Mr. Donziger surrender his devices for
19 imaging to the neutral forensic expert by a date certain? He
20 didn't do it. He still hasn't done it to this day.
21 Mr. Donziger doesn't dispute that.

22 Number three, Mr. Donziger, in June of 2019, was
23 directed to surrender his passport to the clerk of this court
24 by a date certain. Did he do it? No, he didn't. He hasn't
25 disputed it.

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1 On those three issues, which Mr. Donziger did not
2 appeal to the Second Circuit, nor seek a stay to the Second
3 Circuit, it's going to be a relatively simple case. This is
4 not about 160 video depositions, it is not about 200,000 pages
5 of discovery. And the steps here have been outlined on more
6 than one occasion in the government motions in this case, and I
7 have cited to those, I'm happy to speak with Ms. Regan about
8 it. Ms. Regan now has 3500 material, she now has the
9 government's exhibit list.

10 With respect to the last three counts of contempt,
11 it's whether Mr. Donziger surrendered, as required by the RICO
12 injunction, his interests in a contingency fee, a 2011
13 agreement, and a 2017 agreement.

14 And then the last count is whether or not Mr. Donziger
15 pledged a portion of his personal contingent interest to
16 another person to get services in violation of the RICO
17 injunction.

18 So this is not about hundreds of thousands of pages of
19 documents, it's not about lots of videos; it's a relatively
20 simple case that's been outlined over and over. Ms. Regan has
21 our exhibits, she has the bulk of the 3500 material. The
22 primary source of that 3500 material would be the FBI Form 302s
23 that the case agents -- that the FBI case agents, working with
24 us from the Justice Department, have created during the course
25 of witness interviews. So this is not the complex case that

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1 it's being made out to be. I'm always available to speak with
2 Ms. Regan if she has questions about some of the exhibits,
3 because I don't think there is much surprise that's going to be
4 in this case.

5 Thank you, your Honor.

6 THE COURT: Ms. Regan?

7 MS. REGAN: Well, your Honor, I guess I would start
8 where Ms. Glavin left off, which is the Second Circuit is still
9 contemplating whether or not the civil contempt order was
10 lawful or not. We still don't even have a ruling on that.

11 And I disagree with Ms. Glavin's idea that this is not
12 a complex or serious case. It's not for the prosecutor to
13 determine what the defenses should or could be.

14 And I guess with regard to COVID, I think,
15 fundamentally, there is a problem with the inability of the
16 defendant, pursuant to the Sixth Amendment, to actually have a
17 fair trial, where witnesses must appear in person, where they
18 can be cross-examined in person, and all of that is extremely
19 problematic, if not dangerous, under the fact that we're in a
20 global pandemic right now.

21 With regard to our witnesses, what I would say is, we
22 want them to appear in person, we want them to be able to
23 travel safely, and to testify in open court along with the
24 general public, along with Mr. Donziger and his choice of
25 counsel. But all of that is being circumvented by facts that

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1 are not within Mr. Donziger's control, mainly a global
2 pandemic, and the fact that Mr. Kuby has informed the Court
3 that he cannot be present until December 7th of 2020.

4 I don't think that Ms. Glavin's reframing of the
5 criminal defense in this case or the complexity of the issues
6 is fair to the defendant.

7 And I think with regard to me trying to defend
8 Mr. Donziger via Jabber from across the country, that just does
9 not seem like effective assistance of counsel, and it would be
10 likely that even if a trial were forced through at the one-year
11 mark, as it is currently being done, it would likely end up
12 being retried down the road because the constitutional rights
13 of the defendant would not be upheld.

14 And I think Mr. Garbus may have something to add, too,
15 so I don't want to have the Court think that I'm his only
16 attorney of record at this point.

17 THE COURT: Mr. Garbus, do you have anything you'd
18 like to add?

19 MR. GARBUS: I do not. I cannot participate in the
20 case, and I've made that clear. I'm on the phone now from
21 Massachusetts.

22 THE COURT: Anything else, Ms. Regan? Anything else,
23 ma'am?

24 MS. REGAN: I don't believe so.

25 THE COURT: Thank you.

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1 Anything else, Ms. Glavin?

2 MS. GLAVIN: Your Honor, I just want to be heard on
3 one issue that Ms. Regan raised, which is her reference and her
4 characterization of the proceeding in front of the Second
5 Circuit, for which there was oral argument last month. What
6 Ms. Regan said is that the contempt decision that Judge Kaplan
7 issued, that it is up on appeal. I want to make very clear
8 what was on appeal, because this has been mischaracterized
9 repeatedly, not only in court papers here, but also -- it's
10 actually been mischaracterized repeatedly by the defense to the
11 press, and it's somewhat concerning, given that we have
12 officers of the court here.

13 What is on appeal before the Second Circuit is that
14 Mr. Donziger did not appeal Judge Kaplan's contempt findings
15 for Mr. Donziger's failure to provide a list, just a list, of
16 the devices that he had, his failure to surrender his computer
17 for imaging. And Judge Kaplan even offered to say, hey, I'll
18 stay any of that material being turned over or disclosed to
19 Chevron that's responsive if you just turn over the devices and
20 you get your appellate brief in on time. Mr. Donziger didn't
21 appeal that, and he did not appeal the orders that directed him
22 to do that, nor the contempt findings. He did not appeal Judge
23 Kaplan's finding of contempt that forms the basis of Counts
24 Four, Five, and Six. He never mentioned in his appellate brief
25 or even contested that he pledged a portion of his personal

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1 contingency interest to someone in order to get \$14,000 worth
2 of personal services.

3 So when we hear again and again that this is all up on
4 appeal in the Second Circuit, that's not true. It's false, it
5 is not true, and it has been a myth that has gone over, and
6 over, and over again.

7 The Second Circuit's decision should not in any way
8 impact whether this contempt trial goes forward. The Second
9 Circuit's decision does not cover at least Counts Four, Five,
10 and Six and certainly Counts One, Two, and Three. So this is a
11 myth that has gone on and on, and I wanted to make a record.

12 THE COURT: Thank you.

13 THE DEFENDANT: Your Honor, can I be heard, please?

14 THE COURT: Yes, sir.

15 THE DEFENDANT: Thank you.

16 First of all, I want to reaffirm what my counsel,
17 Ms. Regan, said. I think two quick points about what
18 Ms. Glavin said: She said that it's false to maintain that the
19 appeal before the Second Circuit doesn't affect some issues
20 that are happening in this criminal contempt case. We
21 disagree. The appeal was about Judge Kaplan's finding holding
22 me in contempt based on me raising money for my clients. All
23 of the other contempts, the civil contempts, that are now --
24 some of which are now the subject of this proceeding flow from
25 that.

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1 THE COURT: That's not true, Mr. Donziger.

2 THE DEFENDANT: Well, that is our position, and it's
3 not for this Court, respectfully, or Ms. Glavin to determine
4 what the Second Circuit appeal is; it's for the Second Circuit
5 to determine that.

6 THE COURT: Even if it was about raising money, it had
7 nothing do with turning over a list of devices or surrendering
8 devices.

9 THE DEFENDANT: All of the issues that Judge Kaplan
10 raised with me on the civil side flow from what we believe is a
11 fundamentally illegal finding to begin with, and we believe
12 those will be potentially washed away if we prevail on this
13 appeal. And the prudent thing to do, respectfully, is to take
14 that into consideration when analyzing whether this trial
15 should go forward under these extraordinary circumstances.
16 That's number one.

17 Number two, on the issue of counsel, since I am the
18 person accused here, and these are my rights, and the Sixth
19 Amendment is designed to provide fairness for the defendant, I
20 don't understand -- and I would really ask for you to
21 explain -- what the difference is between November 4th and
22 December 7th, when November 4th is 15 months since I was first
23 in your court, which was August 6th of last year, and
24 December 7th is 16 months. I need counsel that can do this
25 case that can actually be in court. This is not machinations.

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1 Okay?

2 If the Curcio hearing was real, and I chose not to
3 waive my right, that's my right, it has to be respected. I
4 thought we were going to come in on September 17th, when this
5 proceeding was asked for by Ms. Glavin. Your Honor postponed
6 that hearing, and we have spent a lot of time -- I thought we
7 were going to come in today and discuss a reasonable way to
8 proceed, so I could be properly represented, but you came in
9 today and made your decision before you heard argument. And I
10 would ask again, please, to reconsider whether this is the
11 prudent way to proceed. It would seem to be in everyone's
12 interests -- obviously, mine, but also yours, the Court's -- to
13 have a proceeding where I can be properly represented.

14 Ms. Regan is unsure if she can get here and, in any
15 event, can't do it alone. Mr. Kuby is a New York lawyer; we
16 don't have the COVID issue with him because he's here. He can
17 definitely do it on December 7th. For him to do it on
18 December 7th, it would be -- it's imperative, I think, that the
19 Court make that determination today or this week, so he can
20 start working, because once we get closer to November 4th, and
21 it's going to be -- you know, if it becomes obvious I'm not
22 going to be properly represented, then that December 7th date
23 is at risk of being delayed. So I would ask the Court to
24 please do the reasonable thing here and let me have the counsel
25 of my choice.

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1 You know, I came in on August 27th, it was the second
2 day of the Curcio hearing, and in good faith, I had an
3 affidavit from Mr. Kuby. In other words, between the Monday
4 and the Thursday of those two aspects of the hearing, when I
5 got my independent advice -- and it's unfair of Ms. Glavin to
6 blame me, I didn't understand what the Curcio, the significance
7 was, until I got independent advice that week. When I came in
8 on the 27th in anticipation of potentially not waiving, I came
9 in with a reasonable alternative to have the trial on
10 December 7th. It really doesn't make a huge difference to the
11 scheduling. I'm still -- my conditions of pretrial release,
12 which are quite onerous. I would ask that the Court please put
13 down a trial for December 7th, and Mr. Kuby can enter his
14 notice of appearance immediately or within a couple of days,
15 and Ms. Regan can do the case with him. If she can't get here,
16 he at least can be here by my side, which I believe is
17 essential to protect my Sixth Amendment right to counsel.

18 Thank you.

19 THE COURT: Anything else, counsel?

20 MS. GLAVIN: No, your Honor.

21 By the way, my silence does not indicate agreement
22 with what Mr. Donziger just said.

23 THE COURT: Anything else, Ms. Regan?

24 MR. GARBUS: This is Martin Garbus.

25 I always thought of myself lately as being totally out

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1 of it as a result of some of your previous rulings. If that's
2 not so, maybe you want me to speak further to the issues, I'm
3 glad to do it.

4 In addition to the COVID issue, I had a medical issue
5 about six weeks ago, which required doctors in New York and in
6 Provincetown. I don't care to -- it certainly affects my
7 ability to do anything, but I don't think it's appropriate --
8 the Court has already indicated its awareness of my situation
9 and that I'm out of the case as far as possible trial work.

10 THE COURT: Mr. Garbus, let me just clarify something
11 for you. You email sometimes, you just said now you're out of
12 the case. For as long as you have a notice of appearance on
13 the court docket, and it's not withdrawn, you are in the case.

14 So it's totally up to you what you want to do.

15 MR. GARBUS: I am out of the case. You and I had
16 previous correspondence about that. I told you I could not be
17 in the case. I said to you, I withdraw. You indicated it was
18 not necessary for me to withdraw.

19 THE COURT: No, I'm sorry, sir.

20 MR. GARBUS: No, no.

21 THE COURT: You can't just email.

22 MR. GARBUS: Judge Preska, excuse me, if there's any
23 misunderstanding about this, I will resolve it as soon as we
24 get off the phone call.

25 THE COURT: Yes, sir.

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1 MR. GARBUS: That contradicts -- Judge Preska, please,
2 that contradicts what you previously said.

3 THE COURT: Let me be very clear, sir --

4 MR. GARBUS: If you want additional information about
5 a medical problem which occurred requiring me to see physicians
6 in Provincetown and discuss with my physicians in New York
7 something that happened six week ago, which I don't care to get
8 into, it's personal, I'm certainly glad to do that.

9 THE COURT: Mr. Garbus, I have no -- Mr. Garbus,
10 Mr. Garbus, Mr. Garbus --

11 MR. GARBUS: Judge Preska, please.

12 THE COURT: I have no interest in your medical
13 condition. I am only responding to your discussion of whether
14 you're in or out of the case, as I have said previously.

15 MR. GARBUS: I withdraw from the case. You and I were
16 involved in motion practice, and you made it very clear. I
17 said I would offer to withdraw from the case if there's any
18 lack of clarity about my involvement. You said, and I don't
19 have the documents before me, and I wasn't prepared to argue it
20 once here, but you were perfectly clear.

21 THE COURT: Anything else, Mr. Garbus?

22 MR. GARBUS: So I formally withdraw from the case
23 now --

24 THE COURT: Yes, sir.

25 MR. GARBUS: -- if there's any lack of clarity.

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1 THE COURT: Thank you, sir.

2 MR. GARBUS: If there's a lack of clarity, Judge
3 Preska, with respect to your interpretation of the previous
4 events.

5 THE COURT: Sir, we will instruct the Clerk of the
6 Court that you have withdrawn your notice of appearance.

7 MR. GARBUS: Yes, ma'am.

8 THE COURT: Thank you.

9 THE DEFENDANT: Your Honor?

10 THE COURT: Yes, sir.

11 THE DEFENDANT: I apologize. Can I make the record
12 clear about something Ms. Glavin said really quick?

13 Ms. Glavin said this case is simple. To us, it's not
14 simple. There are six counts that relate to many, many, many
15 documents and events that took place over a period of years.
16 It's probably the most complex civil case in the history of
17 this district. It has 3,000 docket entries.

18 Ms. Glavin herself, if I remember correctly, said last
19 August, when Mr. Frisch was representing me, that she needed
20 months, she needed months to get up to speed. Suddenly,
21 Ms. Glavin is trying to rush me to trial without counsel, it's
22 a very simple case, but if it was so simple, why are there
23 125,000 pages of documents? That's number one.

24 Number two, she acts like I don't dispute any of this,
25 okay? There are certain facts she's correct, I don't dispute,

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1 but that's not the legal question in this trial. The legal
2 question is whether the actions by me rise to a level of such
3 willful disobedience, a court orders that they are criminal as
4 opposed to a standard civil discovery dispute.

5 So she can't say, oh, he doesn't dispute it as if this
6 is going to be a quick trial. I mean, I have strong defenses,
7 in my opinion, in the opinion of my able counsels, two of whom
8 have been removed, to all of these counts. We intend to try
9 this case robustly. I believe I am innocent of these six
10 charges, and I believe before a fair factfinder, I would be
11 found -- I would be acquitted. I don't mean to cast aspersions
12 on the Court. You know I've sought a jury for this trial, and
13 I've been denied, I get that. But I just want to be clear that
14 this is (a) not a simple case, and (b) I have strong defenses
15 to all six counts.

16 Thank you.

17 THE COURT: Thank you.

18 All right, counsel. First of all, Mr. Friedman,
19 Ms. Littlepage, and Mr. Donziger all knew the facts which arose
20 out of the underlying civil case. When the criminal contempt
21 charges were brought, Mr. Donziger chose Mr. Friedman and
22 Ms. Littlepage, knowing of their involvement in the underlying
23 facts. The specific issue was explicitly raised in May. There
24 was no indication that Mr. Donziger would decline to waive the
25 potential conflict. Indeed, Mr. Frisch himself said in his

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1 affidavit that he did not foresee that Mr. Donziger would
2 refuse to waive the potential conflict, and he only did so
3 after the Court declined to adjourn the trial date.

4 In any event, once Mr. Friedman and Ms. Littlepage
5 were disqualified as a result of Mr. Donziger's failure to
6 waive the potential conflict, Mr. Donziger has still had 70
7 days to prepare for trial and/or to retain new counsel, a
8 presumptively adequate time.

9 With respect to Ms. Regan's discussions of November 4,
10 volunteer activities, whether relating to animals or elections,
11 do not overcome counsel's duty to represent a client zealously.

12 Finally, counsel do not get to determine when a case
13 is tried. It is the Court's determination when a case is to be
14 tried. Indeed, this Court has already conducted jury trials
15 last week and is choosing a jury again today. So the motion to
16 reconsider is denied.

17 With respect to the witness list, while Ms. Regan said
18 that she did her best with respect to the September 4
19 document -- and I have absolutely no reason to doubt her word
20 on that -- one would have thought that Mr. Friedman and
21 Ms. Littlepage had already been at work on that list since it
22 was due at or about the time Ms. Regan submitted the
23 September 4 document. So this is not a surprise either.

24 Now, Ms. Regan, Ms. Glavin has asked for a proffer on
25 the subject matter of the testimony of these witnesses, so that

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1 she can determine whether or not the prosecution objects to
2 their appearing remotely.

3 What do you say to that, ma'am?

4 MS. REGAN: There is no legal authority to force the
5 defense to disclose its case before the law requires, and COVID
6 does not change that. If the trial is to go forward in the
7 middle of a pandemic, it does not mean that the traditional,
8 quote, trial by ambush, a basic principle of federal criminal
9 law, does not still apply.

10 We do not intend to disclose a proffer of our witness
11 testimony in advance of this criminal trial.

12 THE COURT: Ms. Glavin?

13 MS. GLAVIN: Yes, your Honor.

14 What I'd like to do is see if I can work with
15 Ms. Regan and if we could have a conversation about this this
16 week. I just ask Ms. Regan take a look our letter - it's
17 September 1st, 2020, it's Docket No. 156. I cite -- the
18 government cites to some cases in that letter about when a
19 defense makes an application to present trial testimony
20 remotely, about some of the standards, including whether the
21 testimony is material. I think let's you and I try to work
22 this out, if we can, and if we can't, we can raise it with
23 Judge Preska.

24 I will say, your Honor, I am going to have difficulty
25 on the issue of witnesses from Ecuador if the defense doesn't

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1 propose circumstances in which their testimony can be taken to
2 preserve the sanctimony of the proceedings. For instance, how
3 will we know who they are, who they say they are? Where would
4 the testimony take place? Who would administer the oath? I
5 don't believe there's any extradition from Ecuador for perjury
6 in a U.S. criminal case, so I will want to take a look on the
7 case law on that, but, Ms. Regan, just so you know some of the
8 things that I'm thinking about, but I'm willing to work with
9 you here. What I'm concerned about with some of the witnesses
10 on the list, and Mr. Donziger absolutely has a right to present
11 a defense, and, in principle, I don't have a problem with
12 videoconference testimony, just as long as the sanctity of the
13 proceedings can be preserved.

14 I think, at a minimum, you could be able to let us
15 know if some of these are character witnesses versus fact
16 witnesses -- you're not hiding the ball there -- and then maybe
17 if you can even tell me what counts they relate to, but let's
18 have a conversation about it.

19 THE COURT: All right. Ms. Regan, would you be kind
20 enough to confer with Ms. Glavin this week and let me know
21 where we are, if you can, by the end of the week?

22 MS. REGAN: Your Honor, I will do that. But just for
23 the record, we are being forced into a situation where we must
24 have witnesses appear by video. It is not our preference. We
25 would want them there in person.

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1 And so, to the extent that Ms. Glavin has prepared
2 witnesses to appear by video, there was not a question as to
3 how the oath would be administered or whether that person would
4 be able to be identified. It seems slightly, perhaps, racist
5 that she is bringing that up with regard to Ecuadorians. We
6 have other witnesses from Barcelona and other countries that
7 are also anticipating to give witness testimony, so I'm not
8 sure why the issue of oath and identifying --

9 THE COURT: Counsel, counsel, counsel, it is
10 traditional -- counsel, it's traditional that when testimony is
11 given out of the country, even in a civil deposition, that it
12 be given in the United States embassy, with various other
13 safeguards.

14 MS. GLAVIN: And, your Honor, if I just might be
15 heard, after having been called racist, that would be a first
16 for me.

17 And, again, Ms. Regan, I'm trying not to attribute bad
18 motives; you're an officer of the court.

19 The issues that I'm raising, particularly Ms. Regan is
20 well aware of the one witness for which the government sought
21 to admit the testimony by videoconference. We filed a motion
22 with that witness. That witness is represented by counsel in
23 Texas. That witness had their deposition taken, at which
24 Mr. Donziger participated remotely. That same witness is
25 someone Mr. Donziger knows well and is very much friendly with

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1 Mr. Donziger. So I don't think there would be an issue of
2 identity, given that I dealt with that witness' attorney who's
3 an officer of the court, and so I'm not concerned about that,
4 and I'm able to track all of that.

5 With respect to Mr. Donziger's witnesses, a witness
6 list of 33 people was proposed, to be testifying remotely, nine
7 of whom reside in New York, so I don't understand why they
8 can't show up at the trial. And so I just don't -- there's a
9 lot of mischaracterizations, and I think accusations, which are
10 inflammatory that are being tossed out, particularly racism.

11 So, Ms. Regan, I would just ask, let's try to work
12 this out like officers of the court.

13 MS. REGAN: I'm happy to do that, but I will also note
14 that one of those Ecuadorian witnesses themselves is a lawyer,
15 so it just seems strange that there's concerns there, but we
16 will work it out.

17 MS. GLAVIN: I appreciate that. I didn't know that.
18 Thank you for telling me. This is why I think our discussions
19 would be really helpful offline as officers of the court
20 together. Thanks, Ms. Regan.

21 THE COURT: And, Ms. Regan, am I correct that only the
22 witnesses that you have set out in your September 4 letter are
23 the ones that you request be permitted to testify remotely?

24 MS. REGAN: Your Honor, at the time that I was forced
25 to produce that list under deadline, I wanted to err on the

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1 side of caution, because of the pandemic, to ensure that even
2 the New York individuals had the option if they were a
3 vulnerable status. So I am not 100 percent certain that all of
4 them will need to appear remotely, but I wanted that ability in
5 case it was necessary.

6 THE COURT: Well, all I'm saying, ma'am, is there
7 are -- I see nine witnesses named on this document. I know
8 that the witness list for the trial was much lengthier than
9 that. My question to you is: Are the names on your
10 September 4 document the only persons with respect to whom you
11 wish to testify remotely? In other words, I don't have to
12 worry about the rest of them, the others are going to come in?

13 MS. REGAN: No, that's not the case, particularly --

14 THE COURT: Well, then, you better update your list
15 and talk with Ms. Glavin this week.

16 MS. REGAN: Yes, your Honor. And, of course,
17 additional people are falling ill from COVID. There are a
18 constant changing set of circumstances with regard to the
19 pandemic.

20 THE COURT: Okay, wonderful. So you'll talk with
21 Ms. Glavin this week and let me know where we are at the end of
22 the week.

23 MR. GARBUS: Judge Preska, can I make one last
24 comment, even though -- I don't see why we're doing this. Why
25 are we going through this kind of process?

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1 THE COURT: Mr. Garbus, thank you for your comment.

2 MR. GARBUS: By the way, you owe the lawyers in the
3 case who -- you used the word machinations, I think you owe
4 those lawyers an apology.

5 THE COURT: Thank you for your thoughts, sir.

6 Anything else today, counsel?

7 THE DEFENDANT: Your Honor, I have one issue.

8 THE COURT: Yes, sir.

9 THE DEFENDANT: I'd rather Ms. Regan raise it. She
10 might have slipped her mind, I can call and tell her, but I'll
11 just raise it myself in the interests of time.

12 Ms. Glavin -- first of all, my position, our position
13 is we want all of our witnesses to appear physically, if
14 possible. The Ecuador witnesses, due to COVID, can't travel
15 right now, and they almost certainly won't be able to travel to
16 a trial on November 4th, they might be able to at a later date,
17 but our intention, if we can make it happen, is to get
18 witnesses into court to the extent possible. So I want to make
19 that clear.

20 Number two, as to the extent that witnesses have to
21 appear remotely, the question of technology has been raised by
22 us, by Ms. Glavin, and Ms. Glavin's position, as I understand
23 it, is that, to the extent that the Southern District of New
24 York system, this video system, cannot accommodate the
25 witnesses we need, the cross-examination, and the documents,

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1 and all that kind of stuff, we need to pay for the upgrade of
2 technology from a private vendor. And my question is: If that
3 becomes necessary, such that witnesses need to appear remotely
4 and in an adequate way consistent with the ability to confront
5 witnesses both for the prosecution and for us to confront
6 Mr. Zelman and whoever else might appear remotely, who will pay
7 for that?

8 I don't have the funds to pay for that. All of my
9 counsel is pro bono. I don't think it would be fair for me to
10 pay for the cost of the criminal trial that Ms. Glavin, and the
11 government, and Judge Kaplan have initiated against me.

12 So my question is: Do you have a way to resolve that,
13 such that if it has to happen, I don't have to bear those
14 costs, please?

15 THE COURT: I don't know the answer to that. I
16 suggest that counsel confer with respect to the witnesses,
17 particularly as to from where they will testify. For example,
18 it's entirely likely that a U.S. Embassy would have the ability
19 to tap into the Court's system, but until we have specificity
20 on that, there's no way to know. So the sooner you get it
21 done, the better.

22 MS. GLAVIN: And one thing I would like to put on the
23 record with respect to that, your Honor, is that the government
24 has worked with the Court's in-house videoconference system - I
25 think the short-term name of it is Jabber. I was unaware that

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1 the Court actually had that capability until this issue came
2 up, and I thought that we, the government, would have to go
3 with an outside vendor. But once I was able to see what the
4 Court is able to do, in terms of accommodating remote testimony
5 with the in-house system that doesn't cost anybody money, it
6 was my view that was the way to go, and that it is adequate,
7 certainly, from the government's perspective. And I think it
8 can be from the defense perspective.

9 I can confer with Ms. Regan, but, again, the
10 government takes the view that the Court has the
11 videoconference system, which people can come into remotely, is
12 adequate for purposes of the Sixth Amendment.

13 THE COURT: All right. I will await your word,
14 counsel, preferably by the end of the week.

15 Anything else today?

16 Thank you, ladies and gentlemen.

17 One more time, Mr. Donziger, the November 4th trial
18 date is a firm date. Make no mistake about it.

19 Thank you, counsel.

20 Good morning.

21 Mr. Reporter, do you need anything?

22 (Pause)

23 THE COURT: Ms. Regan, good morning.

24 * * *